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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 909

PHILAMON LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 30–41), is reported at 298 F. 2d 176. The Board's Decision and Order (R. 1–5)[1] are reported at 131 NLRB 80.

JURISDICTION

The decision of the court of appeals was entered on January 17, 1962 (Pet. 30–41), and a decree was entered on February 1, 1962 (Pet. 42). The petition for a writ of certiorari was filed on April 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] References designated "R." are to the portions of the record printed as an appendix to the Board's brief in the court below.

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that petitioner violated Section 8(a)(5), (2) and (1) of the Act by refusing to bargain with the union representative selected by a majority of its employees; by interfering in the formation of and providing assistance to employee collective bargaining committees; by promising and granting employee benefits for withholding or withdrawing support from the union; and by interrogating employees about activities on behalf of the union.

2. Whether the Board properly ordered petitioner to bargain with the union, even though it may have lost majority support, where such loss was attributable to the unfair labor practices.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 26–29 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On August 6, 1959, the union,[2] holding authorization cards from a majority of the employees in an appropriate unit, sent petitioner a telegram advising of its majority status and requesting that petitioner telephone the union, at a stated number, to arrange an early meeting for the purpose of negotiating a collective bargaining agreement (R. 12, 14, 15, 19; 54–55,

[2] Local Union 868, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

60–65, 67–74, 76–77, 80, 86–87).[3] Petitioner failed to respond to this telegram or to comply with any of a number of subsequent requests for recognition and bargaining which the union made between August 6 and August 14 (R. 19–23; 87–91). Company personnel in positions of authority were uniformly unavailable when the union called,[4] and messages which the union left with petitioner were never answered although union representatives were assured that they had been delivered (R. 12, 13, 19–23; 90, 98).[5]

While the union was trying unsuccessfully to communicate with someone with authority to act on its request for recognition, Anne Dee, a staunchly anti-union employee, was able to make an appointment with petitioner's president, Boris Grib, on August 13, to urge him to call a meeting of all employees to discuss the union's claim of majority (R. 12–13, 23–24; 222–225). This request was immediately granted

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[3] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[4] Petitioner's president was described as "in conference" (R. 13, 19, 23; 87–88, 92), "on vacation" (R. 12, 20; 88), or "out to lunch" (R. 13; 92), when the union tried to reach him. The plant manager was said to be "not in yet" (R. 13; 90), or "gone for the day" (R. 12, 21; 90).

[5] On August 14, for example, the union offered to submit its authorization cards for a check by any impartial person and to withdraw its request for recognition if it was found not to possess a majority. Petitioner's plant manager answered, however, that the Company's president, who had not come in yet, would have to decide this question and suggested that the union representatives call back. One of the representatives, accordingly, telephoned the plant twice that afternoon, but was unable to reach either the plant manager or president and finally left a message for one of them to call him back; the call was never returned (R. 13, 22–23; 90–92, 98).

and a meeting was called on company time (R. 13, 24–25; 225). In the course of the meeting, which lasted an hour or more, Grib told the employees of the union's telegram requesting recognition and of a union petition for representation which had been filed with the Board on August 10. He added that the union might not really have the support of a majority, and that there would be an election in which it would be up to the employees to decide whether they wanted a union (R. 13, 20–21, 24, 25; 55, 103–104, 106, 120–121, 127, 131, 134, 154, 171, 225). In response to employee complaints that petitioner had been failing to process their grievances, Grib answered that he had been very busy and that his staff had "let him down" by failing to bring the employees' problems to his attention (R. 25; 104). He stated that the employees should have come directly to him with their complaints, either on an individual basis or through a grievance committee, and that such a committee could still be formed (R. 27–28; 105, 156). After listening to employee demands concerning wages, sick leave and profit sharing, President Grib told them that a pay raise had been "in the fire" for a few months and would be granted whether the union got in or not (R. 25–26; 105, 120, 123, 132, 141, 156).

The next day, Friday, August 14, an employee committee of eight or nine was ushered into President Grib's office to present certain "gripes" on behalf of all the employees (R. 13, 26; 137, 159–160, 230–231). (Representatives of the union were still attempting, without success, to see or speak to Grib (n. 5, *supra*)).

Grib reiterated his promise of a pay raise, promised to give consideration to a proposal on sick leave which he said sounded "plausible," and stated that, in view of the strong feeling about the profit-sharing plan among the employees, he would do away with it if they wished and give them its equivalent in wages (R. 27; 144, 160, 176–177). He added that, "at this particular time, he was restricted in making promises of any kind whatsoever," but that the employees should "certainly feel free at any time" to see him about any problems or complaints they wanted to raise (R. 29; 235). Grib further told the employees: "whether you come in as a union committee or whether you come in individually, my ears have always belonged to the employees in the plant," and stated that "there would be certain definite increases in all kinds of benefits in the future, on a steady basis" and that the employees would "get a better deal" if they passed the union by (R. 29; 126, 235, 237).

Immediately after the committee left Grib's office, the employees, with Company permission, held a meeting of their own in which they discusssed the committee's meeting with Grib and the formation of a standing committee to negotiate with him on a regular basis (R. 39; 140, 146–148, 150, 164–165, 178-179). Some days later, the employees selected representatives for such a committee while two Company foremen stood by, but the committee never functioned or sought to negotiate with petitioner (R. 39, 42; 156–158, 168–169).

The following Monday, August 17, still without a meeting with the union, petitioner's plant manager, Shinerer, asked each employee if he would prefer a pay increase of 10 cents an hour in lieu of participation in petitioner's profit-sharing plan, and a majority said that they would (R. 32; 235–236). In the course of this poll, employee Trockel, who had been absent the preceding Friday, was invited to President Grib's office where Shinerer and Grib told him about the discussion with the employee committee (R. 31; 108–109). When asked what he thought of the 10-cent pay increase, Trockel answered that he was willing to go along with the wishes of the majority (R. 31; 109). As the conversation ended, President Grib told Trockel that he and another employee who had been among the first to sign union authorization cards did not have to worry about their jobs, "there would be no witch hunt" (R. 31–32; 110).

On Friday, August 21, the 10-cent pay raise, voted on the preceding Monday, went into effect (R. 32–33; 216–217). The following Monday, August 24, the employees held a meeting with representatives of the union, at which some of them asked the union to hold off for a while because "they had formed some kind of a group which had been discussing their * * * gripes with Mr. Grib * * *" and, if they "received what they asked for, then they couldn't see why they needed a union to get it for them" (R. 37; 115, 215–216, 246–247).* A number of employees asked for the return

*On August 14, two employees had made a similar request to the union to delay action until it could be determined if President Grib intended to live up to his promises (R. 30; 92–93, 166–167, 183).

of their authorization cards (R. 37; 115, 215). On September 25, petitioner adopted the sick leave plan previously suggested by the employees' committee, and on November 1 put into effect the general wage increase, amounting to 10 cents per hour, which Grib had promised on August 13 and 14 (R. 33; 217, 248).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that petitioner refused to bargain with the union when it represented a majority of the employees in an appropriate unit, interfered in the formation of and contributed assistance to employee bargaining committees, and coerced its employees in the exercise of their statutory rights, in violation of Section 8(a)(5), (2) and (1) of the Act.[7] The Board ordered petitioner to cease and desist from the unfair labor practices found, and, *inter alia*, to bargain with the union, upon request. (R. 2–8.) Rejecting petitioner's contention that it was justified in refusing to bargain with the union because by August 24 it appeared that some of the employees had withdrawn their support, the Board, quoting from *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 687, stated (R. 37):

> [Petitioner] cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though

[7] In its Decision and Order, the Board adopted the findings, conclusions and recommendations of the Trial Examiner (R. 2).

> the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will.

C. THE DECISION OF THE COURT OF APPEALS

The court below upheld the Board's unfair labor practice findings as adequately supported by the record and enforced the Board's order in full (Pet. 31, 41). The court rejected petitioner's contention that the bargaining part of the order should be conditioned upon the union demonstrating in a Board election that it had majority support, since only 6 of the original 18 union adherents remained in the bargaining unit (Pet. 39). Concluding that the contention was foreclosed by *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 72, and its own decision in *National Labor Relations Board* v. *Stow Manufacturing Co.*, 217 F. 2d 900, the court added (Pet. 41):

> Even without such established precedents, we would be hard pressed to reject this exercise of the Board's remedial powers. The union lost majority status because of respondent's violations of the law. The only effective remedy left in the present case is the requiring of recognition. And, indeed, as far as future cases are concerned, a denial of power to the Board here might well encourage employers to refuse to bargain, commit the ancillary violations, fight the unfair labor practice charges to the courts, and then rely upon the inevitable intervening turnover in personnel to ward off the only effective remedy remaining. In any case,

> we cannot say such a rationale may not be adopted and applied by the specialized agency entrusted by Congress with the principal enforcement duties under the Act."

ARGUMENT

1. Petitioner's first contention (Pet. 7–10) raises the question whether the Board's unfair labor practice findings are supported by substantial evidence. The holding of the court below that those findings are so supported (Pet. 31) does not warrant review by this Court. See *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502. Furthermore, the facts summarized in the Statement and in the court's opinion (Pet. 31–39) make it clear that the Board was fully justified in concluding (R. 2, 37) that petitioner refused to meet and bargain with the union, not because of a good faith doubt that it represented a majority of the employees, but in order to gain time to undermine the union; and that it then embarked on a campaign to achieve that end, by assisting the employees to set up their own bargaining committees and by promising and granting them benefits for withdrawing their support from the union.

2. Petitioner's remaining contention (Pet. 10–25) challenges the propriety of the Board order directing

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[1] The court distinguished its decisions in *National Labor Relations Board* v. *Adhesive Products Corp.*, 281 F. 2d 89; *National Labor Relations Board* v. *Marcus Trucking Co.*, 286 F. 2d 583; and *National Labor Relations Board* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, on the basis of the "special considerations" there involved (Pet. 39–40). These cases are discussed *infra*, pp. 11–12.

it to bargain with the union.[9] It is petitioner's position that, because almost 3 years have elapsed since the union's original request for bargaining and a turnover in personnel has meanwhile occurred, it is "punitive" and contrary to the policies of the Act to saddle the present employees with the union as their bargaining representative; that a bargaining order should at least be conditioned upon the union demonstrating in a Board conducted election that it enjoys the support of a majority of the present employees. As the court below noted (Pet. 40), this argument, in circumstances similar to those here, was rejected by this Court over 18 years ago in *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702. That decision, which retains its validity today,[10] holds that, where, as here, a union's alleged loss of majority is fairly attributable to the employer's unfair labor practices, he may properly be required to bargain with the union for a reasonable period of time irrespective of the loss of majority. Such an order is remedial rather than punitive, for it is the only effective means of preventing the employer

[9] Petitioner argues (Pet. 10–14) that the enforcement of the bargaining order presents the pure question, not previously considered by the Court, of the right of the employees voluntarily to change their minds after signing union authorization cards. Whether this question would warrant review need not be decided for it is not presented here. The Board found, and was affirmed by the court of appeals, that any changes of mind were the result of the employer's unfair labor practices (R. 36–37; Pet. 38, 41).

[10] See *National Labor Relations Board* v. *Katz*, No. 222, this Term, decided May 21, 1962, slip op., p. 12, n. 16; *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112.

from benefiting from his original violations of the Act (321 U.S. at 704–705).[11] Contrary to petitioner (Pet. 10–14), this remedy does not forever "freeze" the employees into the union without giving them a chance to change their minds. As the Court further recognized in *Franks* (*id.*, at 705–706), after a reasonable period of time, provided the order has been complied with, "the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships."

The recent cases cited by petitioner (Pet. 16–19), in which the courts have conditioned the direction to bargain upon the outcome of a Board election, are, as the court below noted (Pet. 40), distinguishable on the basis of "special considerations."[12] Assuming *arguendo* the validity of the exceptions drawn in those cases, the court below properly found that they had no application to the instant case. Thus, the shift of majority support in *Marcus Trucking*[13] was found to be "uncoerced" and not attributable to the refusal to bargain, which was of a technical nature. In *Superior*

[11] Petitioner seeks to distinguish the present case from *Franks* on the ground that the employer there conducted "an aggressive, old-style antiunion campaign" (Pet. 16). But, as the court below stated, "[t]hat factor is relevant only to the issue of whether the employer's . . . [unlawful conduct] caused the union's loss of majority status" and where causation "is clear," as it is here, the distinction has no significance (Pet. 41).

[12] The other cases relied on by petitioner (Pet. 10–12) precede the decision of this Court in *Franks*, and thus, to the extent inconsistent with it, must be deemed overruled.

[13] *National Labor Relations Board* v. *Marcus Trucking Co.*, 286 F. 2d 583, 593 (C.A. 2).

Fireproof Door,[14] the loss of majority was viewed as due primarily to the union's virtual "abandonment" of the employees.[15] In *Adhesive Products*,[16] employee sentiment had vacillated rapidly among four different unions, none of which enjoyed a clear majority for any substantial period of time. Finally, in *Perry Coal*,[17] unlike the present case, the union had enjoyed a period of contractual relations with the employer, before the employees "clearly indicated their choice of * * * [another union] as their representative."[18]

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[14] *National Labor Relations Board* v. *Superior Fireproof Door & Sash Co., Inc.*, 289 F. 2d 713, 722 (C.A. 2).

[15] Another factor relied on by the court in *Superior Fireproof Door* to justify conditioning the bargaining order on a new election was the "inordinate delay that characterized the course of [the] proceeding before the Board"; *i.e.*, 471 days had intervened between the filing of the charge and the issuance of the complaint (289 F. 2d at 723). Petitioner seeks to fit the present case in this category. Here, however, the complaint was issued within a month after the charge was filed (Pet. 6), and see *Katz*, *supra*, n. 10.

[16] *National Labor Relations Board* v. *Adhesive Products Corp.*, 281 F. 2d 89, 90–91 (C.A. 2).

[17] *Perry Coal Co.* v. *National Labor Relations Board*, 291 F. 2d 126, 127 (C.A. 7). The limited nature of the holding in *Perry* is shown by the Seventh Circuit's subsequent decision in *National Labor Relations Board* v. *John S. Swift Co.*, April 23, 1962, 50 LRRM 2017, 2020, where the court enforced a bargaining order in a situation analogous to that presented here.

[18] *International Ladies' Garment Workers* v. *National Labor Relations Board*, 366 U.S. 731, and *Sperry Gyroscope Company*, 136 NLRB No. 45, cited by petitioner (Pet. 19, 21), are inapposite, for neither involved a refusal to bargain finding and thus there was no occasion to include a direction to bargain in the Board's order in either case. In *Garment Workers*, the violation consisted of according exclusive recognition to a minority union; the employer was directed to cease recognizing and bargaining with that union, until such time as the Board should direct a new election and an uncoerced majority of the em-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1962.

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ployees should select the union as their representative. In *Sperry Gyroscope*, the employer had unlawfully fostered and encouraged a decertification movement among the employees; the Board ordered the employer to cease and desist and to post an appropriate notice, and added that, when compliance with this order had been effected, the Regional Director could proceed to an election on a new representation petition which had meanwhile been filed.

U.S. GOVERNMENT PRINTING OFFICE 1962